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No. 02-1609

In the Supreme Court of the United States

CITY OF LITTLETON,

Petitioner,

v.

Z.J. GIFTS D-4, LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF COMMUNITY DEFENSE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) entails a prompt judicial determination or a prompt commencement of judicial proceedings.

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INTEREST OF *AMICUS CURIAE*

Community Defense Counsel ("CDC") is a nonprofit legal and educational organization that serves land use planners, local elected officials and municipal attorneys in the area of adult business regulation.[1] CDC services the public interest through training seminars, legal resources, and litigation services. CDC has drafted hundreds of sexually oriented business ordinances for municipalities across the country.

The crime, blight, and spread of disease caused by sexually oriented businesses are an ongoing concern for the local governments CDC serves. A narrowly tailored, content-neutral regulation furthers the substantial government interest of preventing such harmful effects. As *Amicus Curiae*, CDC's expertise will assist this Court in analyzing the relevant case law regarding this important case. CDC files this brief in support of Petitioner, and urges this Court to reverse the holding of the Court of Appeals.

SUMMARY OF ARGUMENT

This Court's unanimous decision in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), rather than its decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), controls the outcome of this case. In *Thomas*, the Court held that a content-neutral time, place and manner permit scheme that contains narrow, objective and definite standards to guide the decisionmaker, and which limits the time in which the

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[1] No counsel for a party authored any part of this Brief. A monetary contribution for the preparation of this Brief was received from the Law & Liberty Institute. The written consent of all parties to the filing of this Brief has been filed with the Clerk of this Court.

decisionmaker must issue a permit, is not an unconstitutional prior restraint if it provides for effective judicial review. *FW/PBS*, on the other hand, involved a sexually oriented business licensing scheme that afforded unbridled discretion to the licensing official to withhold issuance of a license, and was thus an unconstitutional prior restraint and therefore appropriately subject to more stringent safeguards.

The City of Littleton's ordinance is for all relevant purposes herein identical to the ordinance in *Thomas*. It is content-neutral, affords minimal discretion to the licensing official, mandates the issuance or denial of a license within a brief and specified period of time and affords effective judicial review. Accordingly, Littleton's ordinance does not constitute a prior restraint and is not subject to the "prompt judicial review" safeguard as required by *FW/PBS*. Because the Littleton ordinance is distinct from the ordinance in *FW/PBS*, and due to the direct applicability of *Thomas* to this case, whether *FW/PBS* imposes a requirement for prompt judicial access or a prompt judicial determination is not appropriately decided by the Court in this instance.

If, however, the Court determines that the modified *Freedman* safeguards announced in *FW/PBS* govern the outcome of this case, and further determines that those safeguards require a prompt judicial *determination*, the Court should announce a rule of procedural due process that is binding on lower courts and requires reviewing judges to dispose of appeals from local administrative licensing decisions in a timely fashion. Such supervision of the administration of justice by the courts protects the rights of all the parties without subjecting local ordinances to successful facial challenges or requiring the enactment of new state statutes.

ARGUMENT

I. A CONTENT-NEUTRAL LICENSING SCHEME THAT CONTAINS NARROW, OBJECTIVE AND DEFINITE STANDARDS TO CONTROL THE LICENSING OFFICIAL IS NOT A PRIOR RESTRAINT AND MUST ONLY BE SUBJECT TO EFFECTIVE JUDICIAL REVIEW (*I.E.*, ACCESS TO A JUDICIAL FORUM) TO SATISFY FIRST AMENDMENT SCRUTINY.

A. This Court's decision in *Thomas* is controlling.

The answer to the question presented in this case is governed by this Court's decision in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). *Thomas* addressed a Chicago Park District ordinance that required a permit in order to "conduct a public assembly, parade, picnic, or other event involving more than fifty individuals." *Id.* at 318. The ordinance was challenged by an organization that on several occasions had been denied a permit to hold rallies advocating the legalization of marijuana. *Id.* at 319-320.

On review, this Court held that the procedural requirements it had previously established in *Freedman v. Maryland*, 380 U.S. 51 (1965), do not apply to a permit or licensing scheme that does not condition expression on a licensing body's approval of content. *Thomas*, 534 U.S. at 321-22 ("*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum."). Justice Scalia, writing for the unanimous Court, issued a lucid opinion detailing the meaning and history of the prior restraint doctrine, which dates back to the English printing press licensing systems. The opinion notes

"the memory of its abuses" that caused Blackstone to warn "against the 'restrictive power' of such a 'licenser'—an administrative official who enjoyed unconfined authority to pass judgment on the content of speech." *Id.* at 320 (quoting 4 W. Blackstone, Commentaries on the Laws of England 152 (1769)).

Paying heed to Blackstone's warning, the unanimous Court reiterated the importance of preventing the unbridled discretion of a licensing official, underscoring the necessity of definite standards to guide that official in his decision-making process, even when implementing a content-neutral permit scheme. *Id.* at 323.

Most notably, the Court rejected the petitioners' argument that the Park District ordinance "*must specify a deadline for judicial review of a challenge to a permit denial*," *id.* at 322 (emphasis added). Rather, the Court held that such content-neutral permit schemes must only be subject to "effective judicial review" in order to withstand First Amendment scrutiny.

The City of Littleton's ordinance, although distinct in its regulatory focus, is—for purposes of the analysis herein—identical to the Chicago Park District ordinance in *Thomas*. Both ordinances (i) are content neutral, (ii) are directed at communicative and non-communicative activity[2], (iii) contain

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[2] See *Thomas*, *supra*, at 322 ("Indeed, the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to all activity conducted in a public park."); and Pet. App. 83a-88a (City of Littleton Code (CLC) § 3-14-1, regulating some businesses that do engage in protected speech, such as adult bookstores, and others that do not, such as sexual encounter establishments).

narrow, objective and definite standards to guide the decisionmaker in issuing or denying a license[3], (iv) ensure that a decision granting or denying a permit will be made in a brief, specified period of time[4], and (v) provide for effective judicial review.[5] Moreover, like the ordinance upheld in *Thomas*, Littleton's licensing ordinance "does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say." *Id.*

The Court of Appeals cavalierly dismisses the importance of the "unbridled discretion" factor in its analysis of the Littleton ordinance. Pet. App. 31a. Despite its explicit acknowledgment that the licensing official has "little or no discretion in reviewing an application," the Court of Appeals held that sexually oriented business licensing schemes are to be accorded special treatment, due to the unwarranted

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[3] See *Thomas*, *supra*, at 324 (the Park District ordinance "provide[s] 'narrowly drawn, reasonable and definite standards' to guide the licensor's determination.") (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)); and Pet. App. 64a-65a (holding that Littleton licensing ordinance, which "identifies eight specific reasons" for which a license application must be denied, does not afford unbridled discretion to the city clerk to approve or deny a license application).

[4] See *Thomas*, *supra*, at 324 ("the Park District must process applications within 28 days."); and Pet. App. 24a-25a (holding that unconstitutional provisions of Littleton ordinance allowing for undue delay are severable).

[5] See *Thomas*, *supra*, at 324 (permit denial subject to judicial review by writ of common-law certiorari in the Illinois courts); and Pet. App. 97a (final licensing decision subject to appeal pursuant to Colorado Rule of Civil Procedure 106(a)(4)).

concern that licensing officials "may be tempted [] to overstep the bounds of the ordinance." *Id.*

That concern, of course, was flatly rejected by this Court in *Thomas*:

> Petitioners contend that the ... ordinance ... allows the Park District to waive the permit requirements for some favored speakers, which insisting upon them for others. That is certainly not the intent of the ordinance. *** Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if an when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements.

Id. at 324-25. Rather than have a special test for content-neutral sexually oriented business licensing schemes—as posited by the Court of Appeals—the better test is the one followed in *Thomas*: if the licensing scheme is content neutral and does not afford unbridled discretion (which includes undue delay[6]), then it is not a prior restraint and is constitutional, as long as effective judicial review is available.

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[6] See *FW/PBS*, *supra*, at 226-27 ("The failure to confine the time within which the licensor must make a decision "contains the same vice as a statute delegating excessive administrative discretion."); *id.* at 223 (the failure to place limitations on the time within which a licensing official must make a decision whether to grant or deny a license "is a species of unbridled discretion.") (citing *Freedman*, at 56-67).

B. *FW/PBS* is not applicable to the present facts in light of this Court's subsequent decision in *Thomas*.

Although the question presented herein asks whether the prompt judicial review requirement imposed by *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) means prompt judicial determination or prompt commencement of judicial proceedings, *FW/PBS* is not directly applicable. Thus, the plurality's intended meaning of "prompt judicial review" in that case need not be ascertained under the present facts.

The Dallas ordinance in *FW/PBS*, unlike the Chicago Park District and Littleton ordinances, constituted a prior restraint because it afforded unbridled discretion to the licensing official to delay the issuance of a license, and thus suppress the applicant's speech. See *id.*, 493 U.S. at 226 ("an ordinance ... requiring a permit or license which may be granted or withheld in the discretion of [a licensing] official is an unconstitutional censorship or prior restraint."). In light of *Thomas*, *FW/PBS* cannot be properly interpreted to classify all content-neutral licensing schemes as prior restraints subject to the modified *Freedman* test announced in *FW/PBS*. Indeed, the park permit scheme in *Thomas* was not a "prior restraint" and, as such, the *Freedman* safeguards were not applicable. Similarly, the Littleton ordinance also is not a prior restraint, and thus should not be subject to *Freedman* or *FW/PBS*.

The critical distinction between the ordinance at issue in *FW/PBS* and the Chicago park district ordinance in *Thomas* is not that the former is a sexually oriented business licensing ordinance and the latter requires park permits. Rather, the critical difference is that the *Thomas* ordinance did not afford unbridled discretion to the decisionmaker, while the Dallas ordinance in *FW/PBS* did. For that reason, the Littleton ordinance, which also does not afford unbridled discretion to

the licensing official, must be sustained as long as "effective judicial review" is available. *Thomas*, *supra*, at 323.

As discussed above, the Court of Appeals held that the *FW/PBS* plurality created a special prior restraint test for application to sexually oriented business licensing schemes only. Pet. App. 31a (citing *Thomas*, 534 U.S. at 322, n.2). Assuming *arguendo* that this is an accurate reading of *FW/PBS*, that decision may still be harmonized with *Thomas* if the Court determines that by "prompt judicial review" the *FW/PBS* plurality intended only to require the possibility for prompt commencement of judicial proceedings, rather than prompt judicial determination. In that circumstance, there is very little practical distinction between *FW/PBS* and *Thomas*. Under either circumstance, the licensing scheme must not afford unbridled discretion (including undue delay), and must afford judicial review. The only difference, ironically, is that the sexually oriented business would be accorded more favorable treatment ("*prompt* judicial review") than political and other highly valued speech (for which only "*effective* judicial review" is required).

It is of no concern, however, because *FW/PBS* did not announce a special test to be applied only to sexually oriented businesses. In Part II of the plurality opinion, there is no discussion of sexually oriented business licensing schemes in particular, such that a distinction from other licensing schemes reasonably may be drawn. Rather, the plurality consistently references the more generic "licensing scheme" throughout that entire section of the opinion.[7] While one

[7] Numerous lower courts have applied *FW/PBS* in non-sexually oriented business contexts which, while not conclusive of the point argued, is indicative of a similar understanding.

might argue that the facts of the case determine the applicability and parameters of the standard enunciated, even if that erroneous hermeneutic is followed in this instance, then the modified *Freedman* safeguards announced in *FW/PBS* would only be applicable to sexually oriented business licensing schemes *that do not limit the time within which the decisionmaker must make a decision whether to grant or deny a license*.[8] Because the Littleton ordinance does not suffer from that defect, *FW/PBS* is not applicable, and the ordinance should be analyzed—and sustained—under *Thomas*.

II. IF THIS COURT CONCLUDES THAT A PROMPT JUDICIAL DETERMINATION IS MANDATED IN ORDER TO SUSTAIN A SEXUALLY ORIENTED BUSINESS LICENSING SCHEME, *AMICUS* URGES THE COURT TO ANNOUNCE A RULE OF PROCEDURAL DUE PROCESS TO INSTRUCT THE LOWER COURTS HOW TO HEAR AND DISPOSE OF LICENSING APPEALS IN A PROMPT AND EXPEDITED MANNER.

If this Court determines that a prompt judicial decision is required in order to satisfy the procedural safeguards specially created for sexually oriented business licensing schemes, such an interpretation will pose great problems for municipalities. See *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000). Indeed, it would be an unwise exercise of the

[8] *Freedman*, for the reasons expressed in *Thomas*, is not applicable to content-neutral licensing schemes like the Littleton ordinance, even if such schemes "[largely] target[] businesses purveying sexually explicit speech." *Thomas*, at 323, n.2 (quoting *FW/PBS* at 224). There is simply no legitimate justification for extending special treatment to sexually oriented businesses, nor was any offered in *FW/PBS*.

supervisory powers of the Court to announce a judicially imposed rule of procedure that cannot be accommodated by municipalities attempting to ameliorate the negative secondary effects of sexually oriented businesses. The procedural rule should be directed to the reviewing court, without striking the sexually oriented business licensing ordinance on its face.

Moreover, in the event this Court determines that a specific time period is required, your *Amicus* urges the Court to instruct states and cities how they might comply.

The most effective and least burdensome proposition would be for the Court to implement a rule of procedural due process that would require state courts to render a speedy ruling within a time period this Court determines is reasonable. This would significantly aid municipalities and relieve them of the onerous burden of having to forgo enacting and enforcing local sexually oriented business regulations until a state legislature either amends an existing statute or adopts a new one. This method of construing a statute to provide procedural due process was adopted by this Court in providing a time limitation for obscenity cases under the customs forfeiture statute. In *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971), this Court held:

> Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seen undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe Sec. 1305(a) to require intervals of no more than 14 days from seizure of the goods to the

> institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court.

This rule of judicial administration was followed in *Gasparo v. City of New York*, 16 F.Supp.2d 198 (E.D.N.Y. 1998).

As a matter of constitutional law, this Court could instruct the state courts that they must provide an assurance of procedural due process by hearing and disposing sexually oriented business licensing appeals in a prompt and expedited manner. This Court could impose specific time limits such as 60 or 90 days, if necessary, in order to guide the lower state courts. *Thirty-Seven Photographs*, *supra*, at 373-74.

Amicus asserts that, as to "*Miranda* warnings," no state statute was required to impose the rule of *Miranda* which dictated that the police must read the *Miranda* rights to an arrested defendant. *Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, every state and federal court knew on and after the *Miranda* decision that the failure to read a defendant his rights would require those courts to suppress evidence or confessions or otherwise provide an exclusionary rule in order to provide the procedural due process afforded under the Fifth Amendment.

Also, in the First Amendment context, this Court imposed a warrant requirement that is not necessary in other Fourth Amendment situations. That rule is self-executing and every state and federal court and law enforcement official knows by reading this Court's decisions what is required of them to provide such procedural due process. See *Roaden v. Kentucky*, 413 U.S. 496 (1973), and *Heller v. New York*, 413 U.S. 483 (1973); see also *New York v. P.J. Video, Inc.*, 475

U.S. 868 (1986); cf. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (procedures not properly followed).

A court's duty to insure proper procedural due process is a matter of the administration of justice and the supervision of the courts, and need not involve the imposition of statutory procedures by the state legislatures or Congress. Although a state could impose specific time limits and procedural mandates by statute or by codification of procedural court rules, nothing in the Constitution or the decisions of this Court requires it to do so. Some states have elected to do so in light of the federal decisions holding municipal sexually oriented business licensing ordinances or state statues unconstitutional. See *Cal. Code of Civ. P.* § 1094.8 (requiring prompt judicial decision in cases alleging prior restraint of speech or expressive conduct), *Tenn. Code Ann.* § 7-51-1110(d) (providing for prompt review); see also *Baby Tam v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000) (Nevada Revised Statutes and local court's rules of practice amended to allow for prompt judicial review of prior restraint claims). However, if the federal courts had merely declared the need for judicial promptness in rendering a decision as a matter of procedural due process, then the state courts could have authoritatively construed existing statutes and provided adequate procedural due process, without infringing on the rights of the states to administer their laws and without the federal courts having had to enjoin or otherwise declare those state laws facially unconstitutional.

Without this Court's instruction as to the meaning of a prompt judicial determination—if indeed that is what is held to be required—questions will remain concerning the extent to which a judicial process must be completed before the time period becomes unreasonable. For instance, would "determination" require that an ordinance provide for

completion of review at both the trial and appellate levels, or is an initial judicial determination sufficient? Likewise, is it sufficient that there is the availability of the right to ask the reviewing court for a temporary restraining order to provide a judicial means of insuring the lack of restraint pending review or appeal? As the Fifth Circuit noted in *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994), to require that "all judicial avenues be exhausted would be an oxymoron," 24 F.3d at 709, and may be inconsistent with *Freedman*, 380 U.S. at 60, that review be provided in a manner "compatible with sound judicial resolution." Any announcement of a rule of procedural due process should be directed at the courts, without the need to strike city or county sexually oriented business licensing ordinances or enact new state statutes.

CONCLUSION

For all of the above reasons, your *Amicus* prays that this Honorable Court reverse the judgment of the Court of Appeals and declare the City of Littleton's ordinance constitutional in that it properly provides for effective judicial review as required by this Court in *Thomas*.

Respectfully submitted,

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